Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

V.M. WHEELER III, Petitioner

v.

KIDDER, PEABODY & CO., INCORPORATED

and

GENERAL ELECTRIC COMPANY, Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

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Counsel for the Petitioner,
Pro Se

QUESTIONS PRESENTED

1. Whether an arbitration provision, otherwise enforceable in accordance with the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 2, is unenforceable and void for public policy as an unconstitutional waiver of the right to trial by jury under the Seventh Amendment to the United States Constitution, U.S.C.A. Const. Amend. VII, when such provision constitutes one sentence of fine print among a multiple-page, standardized, pre-printed contract between parties far from equal in bargaining power, where such contract is presented to an officer of a corporation by his employer as a condition of his employment prior to any controversy arising, where there is no opportunity for the individual to negotiate over the terms of such contract, and where the individual has no choice other than to accept the contract as written.

2. Whether the lower courts erred in the application of Texas state law in dismissing Petitioner's Federal suit on grounds of collateral estoppel and by applying the doctrine of res judicata to an interlocutory order of the Texas state court.

3. Whether the lower courts sanctioned a departure by the Texas state court from the accepted and usual course of judicial proceedings in its denial to Petitioner of his statutory right to a jury trial on issues relating to the making of a purported arbitration agreement.

PARTIES TO THIS ACTION

The parties to these proceedings are the petitioner, V.M. Wheeler III, and the respondents, Kidder, Peabody & Co., Incorporated, and General Electric Company.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

V.M. WHEELER III, Petitioner
v.
KIDDER, PEABODY & CO., INCORPORATED
and
GENERAL ELECTRIC COMPANY, Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

Petitioner, V.M. Wheeler III, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit").

OPINIONS BELOW

An Order extending the time for filing of this Petition For Writ Of Certiorari to April 22, 1994, was entered by this Court on February 9, 1994. The Order is reproduced in the Appendix. (App. A)

The Opinion of the Fifth Circuit was entered on October 26, 1993. Pursuant to Local Rule 47.5.1, the Opinion was not published. The Opinion is reproduced in the Appendix. (App. B)

Petitioner's Petition For Rehearing by the Fifth Circuit was denied on November 23, 1993. The Order of the Fifth Circuit is reproduced in the Appendix. (App. C).

An Order Of Dismissal by the United States District Court for the Southern District of Texas, Houston Division (the "District Court"), was rendered on October 13, 1993. The Order of Dismissal is reproduced in the Appendix. (App. D)

JURISDICTION

The District Court has original Federal question jurisdiction under 28 U.S.C.A. Section 1331 over the causes of action in Petitioner's Federal suit under the Sherman Act, 15 U.S.C.A. Section 1, et seq., and the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C.A. Section 1961, et. seq. The District Court has jurisdiction over the state causes of action under the doctrine of pendant jurisdiction and also under 28 U.S.C.A. Section 1332, because the suit is between citizens of different states and the jurisdictional amount is satisfied.

The Fifth Circuit has jurisdiction over Petitioner's appeal under 28 U.S.C.A. Section 1291. A final decision dismissing Petitioner's suit was entered by the District Court.

The judgment of the Fifth Circuit was entered on October 26, 1993. A timely Motion For Rehearing was filed with the Fifth Circuit, which Motion was denied on November 23, 1993. An Order extending the time for filing of this Petition For Writ Of Certiorari to April 22, 1994, was entered by this Court on February 9, 1994. This Court has jurisdiction pursuant to 28 U.S.C.A. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition For Writ of Certiorari involves the Seventh Amendment to the United States Constitution, U.S.C.A. Const. Amend. VII, and certain provisions of the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 4, copies of which are reproduced in the Appendix. (App. E and F, respectively).

STATEMENT OF THE CASE

Petitioner was a vice-president of respondent, Kidder, Peabody & Co., Incorporated ("Kidder"), hired in April 1990 to work in the areas of investment banking and corporate finance. Although he was not a stockbroker, as a condition of employment, Petitioner was required to sign a "Form U-4" Uniform Application of Registration (the "U-4") with the New York Stock Exchange. Buried in fine print among multiple, pre-printed pages of the standardized U-4 was an arbitration clause, which provides,

> I agree to arbitrate any dispute, claim or controversy, that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . .

Petitioner became dissatisfied with Kidder's policies and expressed his intention to leave the firm. Kidder allegedly made an oral agreement with Petitioner that if he would complete a major project on which he was working, Kidder would treat him fairly in the future and not discharge him until a reasonable time after the completion of the transaction. Immediately following the close of the transaction, however, Kidder terminated Petitioner's employment, allegedly depriving him of the bonus he would have received for his work during that calendar year.

On September 17, 1991, Petitioner filed suit in Texas state court against Kidder and Nancy Quinn, a corporate officer, alleging fraud, defamation, intentional infliction of emotional distress and quantum meruit. Respondents filed a motion to stay the proceedings and to compel arbitration. A hearing was held on January 31, 1992, in which the court denied Petitioner's motion to compel discovery, which he claimed would prove the invalidity of the arbitration clause. The court also indicated that it would sign an interlocutory order staying the proceedings.

Respondents contend that the court actually issued its order at that hearing and did not merely express an intent to do so in the

future. The docket indicates a January 31, 1992, order to compel arbitration. On February 6, 1992, Petitioner moved to dismiss his suit voluntarily without prejudice pursuant to Tex. R. Civ. P. 162. Despite the nonsuit, the state judge signed an order on March 3, 1992, ordering arbitration.

On June 8, 1992, Petitioner filed an action in the District Court against Kidder and respondent, General Electric Company ("GE"), the parent corporation of Kidder, alleging fraud in the inducement of the arbitration agreement, antitrust violations, civil Racketeer Influenced and Corrupt Organizations Act ("RICO") violations, defamation, intentional infliction of emotional distress, debt and quantum meruit. Respondents moved to compel arbitration, and GE moved to dismiss the RICO claim for failure to plead with particularity. On October 13, 1992, the District Court sua sponte dismissed Petitioner's suit on the grounds of comity and judicial economy.

Petitioner appealed to the Fifth Circuit. On October 26, 1993, the Fifth Circuit affirmed the Order of Dismissal by the District Court, and on November 23, 1993, the Fifth Circuit denied Petitioner's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

A.

THE ARBITRATION PROVISION UPON WHICH RESPONDENTS RELY IS UNENFORCEABLE AND VOID FOR PUBLIC POLICY UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS THE PURPORTED WAIVER OF PETITIONER'S RIGHT TO JURY TRIAL WAS NOT VALIDLY OBTAINED BY RESPONDENTS

The Seventh Amendment to the United States Constitution guarantees citizens the right of trial by jury in suits at common law, where the amount in controversy exceeds twenty dollars. U.S.C.A. Const. Amend. VII While the right to jury trial may be waived,

Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Intern., 373 F.2d 136 (8th Cir. 1967), certiorari denied, 389 U.S. 827, 88 S.Ct. 77, 19 L.Ed2d 83, it generally is recognized that courts must indulge every reasonable presumption against waiver of this fundamental guaranty of the rights and liberties of American citizens. Hodges v. Easton, 106 U.S. 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882); Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177 (1937)

Contractual jury waiver provisions are enforceable only if entered into knowingly and intentionally. National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977)

Consistent with the reasoning of this Court in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), in which it refused to uphold a contractual provision waiving due process rights (noting that there was "no showing whatever that the Appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights"), at least two Federal Circuit Courts of Appeals have shifted the burden to those parties seeking enforcement of waivers of rights to trial by jury to prove that the consent of the party against whom such waiver is sought to be enforced was both voluntary and informed. Leasing Service Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986); National Equipment Rental, *supra*. Conversely, the evidentiary burden has been shifted in the Sixth Circuit to those parties who seek to avoid a waiver to prove that consent to the waiver was not knowing and voluntary. K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985)

In National Equipment Rental, *supra*, a controversy analogous to that of the Petitioner, the Second Circuit considered the issue of jury trial waivers buried in fine print within multiple clause agreements. In that case, the Second Circuit, noting the gross inequality of the parties' bargaining power and that the party against whom enforcement of the waiver was sought had no choice other than to accept the contract as written, held that a waiver of an individual's right to trial by jury buried in the eleventh paragraph of a fine print, sixteen clause agreement does not constitute knowing and intentional waiver of this right.

It is undisputed that the amount in controversy in these proceedings exceeds the amount provided for under the Seventh Amendment. Petitioner has maintained throughout these proceedings that any purported waiver of his right to jury trial was involuntary, uninformed, unintentional and unknowing. Furthermore, Petitioner consistently has asserted that such purported waiver constituted one clause buried in fine print among multiple, pre-printed pages of the standardized U-4 which was presented to Petitioner as a condition of employment following his resignation from his prior employer and immediately upon his joining Kidder; that the U-4 represented merely one of many documents presented to Petitioner for his signature in the flurry of paperwork associated with various personnel papers hurriedly submitted to Petitioner at Kidder; that he was not afforded the opportunity to negotiate the terms of the contract; that the arbitration provision was neither bargained for nor discussed in connection with the execution of these documents; and that he had no choice other than to accept the contract as written.

While Petitioner has never challenged, and does not challenge, the Constitutionality of the Federal Arbitration Act, 9 U.S.C.A. Section 1, et seq., the effectiveness of waivers of individuals' rights to jury trial which are properly obtained through the valid consent of parties against whom such waivers are sought to be enforced, or the validity of the purported contract as a whole, Petitioner respectfully submits that the purported waiver of his right to jury trial in question in these proceedings falls far short of the Constitutional safeguards which have been adopted by this Court and other Federal courts of this land.

B.

THE LOWER COURTS ERRED IN THE APPLICATION OF TEXAS STATE LAW IN DISMISSING PETITIONER'S FEDERAL SUIT ON GROUNDS OF COLLATERAL ESTOPPEL AND BY APPLYING THE DOCTRINE OF RES JUDICATA TO AN INTERLOCUTORY ORDER OF THE TEXAS STATE COURT

The Fifth Circuit correctly states that, in applying the doctrine of collateral estoppel, Federal courts must apply the law of the state

from which the judgment emerged. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984)

Petitioner respectfully submits that the Fifth Circuit misapplied Texas state law in two respects.

First, the Fifth Circuit holds (i) that the state court order compelling arbitration represented a final adjudication of the issue of arbitrability and (ii) that the Petitioner was collaterally estopped from challenging the arbitrability of the purported agreement between Petitioner and Kidder.

In Anglin Co., Inc. v. Arthur Tipps, 842 S.W.2d 266 (Tex. 1992), the Supreme Court of Texas held expressly that an order relating to arbitration under the Federal Arbitration Act is not a final judgment under Texas state law. Similarly under Texas state law, a final judgment is required to establish res judicata and, hence, collateral estoppel. See, Homeright Co. v. Exchange Warehouses, Inc., 526 S.W.2d 241, 246 (Tex. App. - Tyler 1975, writ ref. n.r.e.) In Homeright, supra, the Texas court of appeals specifically addressed the effect of interlocutory decrees and held that an interlocutory decree entered prior to a nonsuit does not support res judicata or collateral estoppel.

Second, Petitioner respectfully submits that the Fifth Circuit applied the wrong precedent in adjudicating the validity of the state court order in respect to the nonsuit procedure, a convention under Texas state law but which does not exist in the Federal courts.

In support of its conclusion that the docket entry of January 31, 1992, was an order of the state court issued at a hearing, the Fifth Circuit sites a decision in 1976 of the Supreme Court of Texas, namely, Reese v. Piperi, 534 S.W.2d 329 (Tex. 1976). In 1980, however, the Supreme Court of Texas held expressly, in McCormick v. Guillot, 597 S.W.2d 345, 346 (Tex. 1980), that oral rendition of a judgment supported by a court's docket sheet is insufficient for purposes of establishing a judgment. This decision is consistent with the long line of cases on this issue in Texas.

In the instant matter, Petitioner moved to dismiss his state court suit voluntarily pursuant to Tex. R. Civ. P. 162. Despite this nonsuit, the state court judge signed an order following Petitioner's nonsuit, ordering arbitration. Petitioner respectfully submits (i) that the Fifth Circuit incorrectly applied Texas state law in sustaining the validity of the March 3, 1992, written order of the state court, as the same was entered subsequent to the nonsuit by Petitioner and (ii) that the Fifth Circuit incorrectly applied Texas state law in holding (a) that the interlocutory state order compelling arbitration represented a final adjudication of the issue of arbitrability and (b) that the Petitioner was collaterally estopped from challenging the arbitrability of the purported agreement between Petitioner and Kidder.

C.

THE LOWER COURTS SANCTIONED A DEPARTURE BY THE TEXAS STATE COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY DENYING PETITIONER HIS STATUTORY RIGHT TO JURY TRIAL ON ISSUES RELATING TO THE MAKING OF THE PURPORTED ARBITRATION AGREEMENT

Petitioner challenges the validity of the purported arbitration agreement on several grounds. Petitioner acknowledges that he bears the burden of showing that he is entitled to a jury trial under the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 4. Petitioner believes that he met this burden by demonstrating in the District Court that, under prevailing law, he would be relieved from his obligations if his allegations prove true.

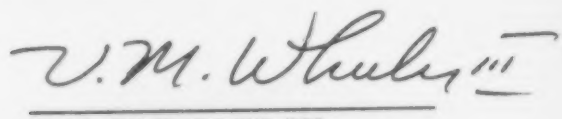
In reviewing this issue in other circuits, the Seventh Circuit has held that, although the Federal Arbitration Act, specifically 9 U.S.C.A. Section 4, speaks only of challenges to "the making" of the agreement to arbitrate, the term encompasses any challenge to the validity of the agreement, even if there is no disagreement that it was "made." Matterhorn, Inc. v. NCR Corp., 763 F.2d 866 (7th Cir. 1985)

By dismissing Petitioner's case on grounds of comity and judicial economy, the lower courts did not expressly rule on Petitioner's request for a jury trial. Petitioner respectfully submits that the lower courts erred in dismissing his case, because Petitioner demonstrated that he is entitled to a jury trial under the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 4, on the question of whether the purported arbitration agreement is void, or revocable, under law or equity.

CONCLUSION

For the reasons stated above, Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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IN THE
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PETITION FOR WRIT OF CERTIORARI
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For The Fifth Circuit

AFFIDAVIT OF SERVICE TO OPPOSING COUNSEL

I, V.M. Wheeler III, hereby certify that on the 21st day of April, 1994, I deposited three true and correct copies of the foregoing in the United States mail, postage prepaid to each of the following:

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SUPREME COURT OF THE UNITED STATES

No. A-667

V.M. Wheeler,

Petitioner

v.

Kidder, Peabody & Company, Inc., et al.

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 22, 1994.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of February, 1994.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2930
Summary Calendar

V.M. WHEELER, III,

Plaintiff-Appellant,

VERSUS

KIDDER PEABODY & COMPANY, INC.,
and GENERAL ELECTRIC COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
(CA H 92 1696)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

V.M. Wheeler, III, a former employee of Kidder Peabody & Company, Inc. ("Kidder"), appeals the district court's dismissal of his suit against Kidder and General Electric Company ("GE") for alleged

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*Local Rule 47.5.1 provides; "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

civil Racketeer Influenced and Corrupt Organizations Act ("RICO") and antitrust violations. Concluding that Wheeler's claims are barred by a prior state court ruling compelling arbitration of these claims, we affirm.

I.

Wheeler was a vice-president of Kidder, hired in April 1990 to work in the areas of investment banking, mergers, acquisitions, and corporate finance. Although he was not a stockbroker, as a condition of employment Wheeler was required to sign a "Form U-4" Uniform Application of Registration with the New York Stock Exchange. The U-4 contains an arbitration clause, which provides,

> I agree to arbitrate any dispute, claim or controversy, that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . .

Wheeler became dissatisfied with Kidder's policies and expressed his intention to leave the firm. Kidder allegedly made an oral agreement with Wheeler that if he would complete a major project that he was working on, Kidder would treat him fairly in the future and not discharge him until a reasonable time after the completion of the deal. Immediately following the close of the deal, however, Kidder terminated Wheeler's employment, allegedly depriving him of the bonus he would have received from his work on that deal.

II.

A.

On September 17, 1991, Wheeler filed suit in state court against Kidder and Nancy Quinn, a corporate officer, alleging fraud, defamation, intentional infliction of emotional distress, and quantum meruit. The defendants filed a motion to stay the proceedings and to compel arbitration. A hearing was held on January 31, 1992, in which the court denied Wheeler's motion to compel discovery, which he claimed would prove the invalidity of the arbitration agreement.

The court also indicated that it would sign an interlocutory order staying the proceedings.

The defendants contend that the court actually issued its order at that hearing and did not merely express an intent to do so in the future. The docket indicates a January 31, 1992, order to compel arbitration. On February 6, 1992, Wheeler moved to dismiss his suit voluntarily without prejudice pursuant to Tex. R. Civ. P. 162. Despite the nonsuit, the state judge signed an order on March 3, 1992, ordering arbitration. The docket indicates, "3-2-92 Order re 1-31-92 Order."

B.

On June 8, 1992, Wheeler filed this action in federal court against Kidder and GE, alleging fraud in the inducement of the arbitration agreement, antitrust violations, RICO violations, defamation, intentional infliction of emotional distress, debt, and quantum meruit. The defendants moved to compel arbitration, and GE moved to dismiss the RICO claim for failure to plead with particularity.[1] On October 13, 1992, the district court sua sponte dismissed Wheeler's suit on the grounds of comity and judicial economy, stating that the "spirit of the order entered in state court must be respected."

III.

We review an order enforcing a state order compelling arbitration for abuse of discretion. C.G. Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1161 (5th Cir. 1992). We need not reach the merits of the arbitrability of the claims, however; since the claims were dismissed on the grounds of comity and judicial economy, the only issue presented is whether Wheeler was entitled to pursue his claims in federal court.

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[1]Kidder was not named as a defendant in one of the RICO claims against GE, as Wheeler alleged that Kidder was the enterprise through which GE engaged in acts of racketeering.

A.

An order of a state court compelling arbitration must be given full faith and credit by a federal court. Allen v. McCurry, 449 U.S. 90 (1980). In determining the preclusive effect of a prior state court judgment, federal courts must apply the law of the state from which the judgment emerged. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984); J.M. Muniz, Inc. v. Mercantile Tex. Credit Corp., 833 F.2d 541, 543 (5th Cir. 1987).

The doctrine of collateral estoppel has the purposes of protecting litigants "from the burden of relitigating an identical issue with the same party or his privy, and of promoting judicial economy by preventing needless litigation." Parkland Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). This circuit requires "judicial finality" before collateral estoppel can be invoked; nevertheless, "finality" does not require a final judgment, but only that the issue has been "fully litigated." Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1190-91 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983).

The controlling issue is whether the state court's order compelling arbitration was effective at the January 31 1992, hearing, or not until March 3, 1992, the date of the signed order.[2] For the order to have

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[2]Had Wheeler dismissed his claim before the state court order was entered, and if the motion to compel arbitration were not a claim for affirmative relief, the state court would have been divested of jurisdiction and the order would have been invalid. According to Tex. R. Civ. P. 162, a party who voluntarily dismisses his suit does not prejudice his right to bring suit again on the same issues. Thomas v. Texas State Bd. of Medical Examiners, 807 F.2d 453, 457 (5th Cir. 1987). A plaintiff has an absolute, unqualified right to take a nonsuit upon timely motion as long as the defendant has not made a claim for affirmative relief. McQuillen v. Hughes, 626 S.W.2d 495, 496 (Tex. 1981) (per curiam).

Since Wheeler asserted federal questions in his complaint, namely violations of the Sherman Act, 15 U.S.C. Section 1, and RICO, 18 U.S.C. Section 1961, the federal district court would have jurisdiction over his action pursuant to 28 U.S.C. Section 1331. Furthermore, the federal district court would have jurisdiction over the state claims through supplemental jurisdiction. As Wheeler correctly notes, a federal court has "no more right to decline the exercise of

been effective on January 31, the judge must have made a specific order, not merely expressed his intention to make the order at some future time.

> The judge's intention to render a judgment in the future cannot be a present rendition of judgment. The rendition of judgment is a present act, either by spoken word or signed memorandum, which decides the issues upon which the ruling is made. The opportunities for error and confusion may be minimized if judgments will be rendered only in writing and signed by the trial judge after careful examination. Oral rendition is proper under the present rules, but orderly administration requires that form of rendition to be in and by spoken words . . . and to have effect only insofar as those words state the pronouncement to be a present rendition of judgment.

Reese v. Piperi, 534 S.W.2d 329, 330 (Tex. 1976).

The January 31 hearing was not transcribed. Nevertheless, the docket entry indicates that an order was issued at that hearing, compelling arbitration. Although a docket entry may not take the place of a separate order of judgment, see First Nat'l Bank v. Birnbaum, 826 S.W.2d 189, 190 (Tex. App.-Austin 1992, no writ) (per curiam), here the docket entry reflected a valid order of the court made at the hearing. Thus, Wheeler's attempted nonsuit cannot abrogate the effect of the state court's order compelling arbitration. Nor are we convinced that the state court motion to compel arbitration was not properly regarded as a claim for affirmative relief.

B.

For the doctrine of collateral estoppel to apply, a party must establish that (1) the facts sought to be litigated in the second action

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jurisdiction which is given, than to usurp that which is not given." Thomas, 807 F.2d at 454 (citation omitted).

were fully and fairly litigated in the prior action, (2) those facts were essential to the judgment in the first case, and (3) the parties were cast as adversaries in the first action. Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984). The issue that Wheeler has been collaterally estopped from relitigating is the validity of the arbitration agreement. First, the issue was fully litigated in state court: A motion to compel arbitration was made by Kidder; Wheeler filed a response opposing the motion; and a hearing was held. Second, the validity of the arbitration agreement was obviously the only issue relevant to the motion to compel arbitration. And third, the parties were identical and, therefore, cast as adversaries.

Wheeler claims that even if collateral estoppel precludes claims against Kidder on issues raised in state court, dismissal was inappropriate for new causes of action brought in federal court and for claims against GE, which was neither a party to the prior lawsuit nor a party to the arbitration agreement. The fact that Wheeler now asserts new causes of action is irrelevant, however. Collateral estoppel precludes relitigation of issues, not claims. The validity of the arbitration agreement has been fully litigated; new causes of action arising out of the same set of operative facts will also be precluded. Wilhite v. Adams, 640 S.W.2d 875, 876 (Tex. 1982); Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 362 (Tex. 1971).

Wheeler cannot complain of GE's use of collateral estoppel. The only party that may object to collateral estoppel is the one who (1) is being collaterally estoppel from litigating an issue and (2) has not already litigated the issue. But Wheeler has already litigated the issue. Any party sharing Kidder's interest in the issue could defensively estop Wheeler from relitigating it. See Restatement (Second) Of Judgments Section 27 cmt. c (1982).

Furthermore, the fact that GE was not technically a party to the arbitration agreement is not fatal. As another court said in J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988), "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." See

also Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976).

Therefore, Wheeler is precluded from relitigating the issue of the validity of the arbitration agreement. The effect of this preclusion is that Wheeler may not sue Kidder or GE, or anybody else for that matter, in state or federal court for any claims arising out of his employment with Kidder. He must arbitrate his claims.

IV.

The parties have already litigated the issue of arbitrability in state court. That court entered a valid order compelling arbitration. A federal court must give full faith and credit to state court orders; therefore, the district court did not err in dismissing Wheeler's suit.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2930

V.M. WHEELER, III,

Plaintiff-Appellant,

versus

KIDDER PEABODY & COMPANY, INC., ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(November 23, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT;

/s/ Jerry E. Smith
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

V.M. WHEELER, III,
Plaintiff

VS.

CIVIL ACTION NO. H-92-1696

KIDDER, PEABODY & CO., INCORPORATED AND GENERAL ELECTRIC COMPANY,
Defendants

ORDER OF DISMISSAL

Pending before the Court is the defendant's, Kidder, Peabody & Co., motion to compel arbitration and the defendant's, General Electric Company, motion to dismiss. The Court having reviewed same is of the opinion that the motions are meritorious. However, the Court chooses to sua sponte dismiss the case for other reasons stated herein.

Litigation History:

In 1991, the plaintiff filed a suit in state court against his former employer, Kidder, Peabody and Nancy Quinn under Cause No. 91-047995 in that state court. The subject matter of that suit is essentially the same as that in this suit. At the conclusion of a hearing on Kidder, Peabody's motion to compel arbitration, the state trial judge ordered the parties to proceed to arbitration pursuant to Article VIII, Section 1 of the American Stock Exchange Constitution. Before the order could be formerly entered, the plaintiff non-suited the case. The docket sheet, however, reflects the order of the court. Thereafter, the same plaintiff brought this suit in federal court, and filed another suit in state court naming only Nancy Quinn as a defendant. In the case at bar, the plaintiff has alleged claims arising

out of his employment relationship with Kidder, Peabody. But, in addition to those claims, the plaintiff asserts Sherman Act and RICO violations against Kidder, Peabody.

It is apparent to the Court that the plaintiff non-suited the first state court action in a deliberate attempt to avoid the state court's order to proceed to arbitration. Therefore, this Court will look to the employment agreement for the sole purpose of determining whether, in the interest of justice and comity this suit should be dismissed.

In determining whether parties are required to arbitrate an employment dispute, the Court must look to the agreement to determine the nature and scope of the agreement. Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047, 1050 (2nd Cir. 1989).

The agreement between the parties states in relevant part:

> "I agree to arbitrate any dispute claim or controversy that may arise between me and my firm, ... that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register ..."

Article VIII, Section 1 of the ASE Constitution provides that:

> "Members, member firms, partners of firms, member corporations and officers of member corporation shall arbitrate all controversies arising in connection with their business between or among themselves ..."

* * *

Read together, these provisions require the parties to arbitrate employment disputes as well as other disputes. In recalling the arguments made in open Court, the Court concludes that there is no dispute that an arbitration agreement exists. The question is whether it should be enforced.

Arbitration agreements are favored in the law and unless the agreement is not susceptible of a reasonable interpretation, or the enforcement nullify other more important federal policies, doubts should be resolved in favor of arbitration. See Rodriguez DeQuijas v. Shearson/American Express, Inc., 109 S.Ct. 1917 (1989); see also Cowdert v. Paine, Webber, Jackson & Curtis, 705 F.2d 78 (2nd Cir. 1983).

The poignant question, in the Court's view, is whether the plaintiff may circumvent the order of the state court by non-suit and refiling essentially the identical suit in state and federal court. In the Court's view, the plaintiff should not. As far as this Court is concerned, the spirit of the order entered in state court must be respected because the order was not arbitrarily entered. A full and fair hearing was granted and no complaint has been made here concerning the process. Because the issue of arbitration has been litigated, no useful purpose is served in permitting the plaintiff a second day in court. In this regard, Jeanes v. Henderson, 688 S.W.2d 100 (Tex. 1985) is dispositive of this issue.

For judicial economy and to preserve the integrity of the judicial process, the Court holds that this suit should be dismissed. See Houston North Properties v. White, 731 S.W.2d 719, 722 (Tex. App.--Houston [1st Dist.] 1987).

The defendant, General Electric Company's, motion for sanctions is DENIED.

It is so ORDERED.

Signed this 13th day of October, 1992.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

AMENDMENT VII - CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S.C.A. Const. Amend VII

FAILURE TO ARBITRATE UNDER AGREEMENT; PETITION TO UNITED STATES COURT HAVING JURISDICTION FOR ORDER TO COMPEL ARBITRATION; NOTICE AND SERVICE THEREOF; HEARING AND DETERMINATION

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. ***If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default,*** or if the matter in dispute is within admiralty jurisdiction, ***the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may,*** except in cases of admiralty, on or before the return day of the notice of application, ***demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.*** If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and there is a default in proceeding thereunder, the court shall make an order summarily

directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C.A. Section 4 (Emphasis Added)